STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1486

Cyriaque Itoua,
Relator,

vs.

Water Heater Innovations, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 14, 2012
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 27524986-3

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Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Relator challenges the unemployment-law judge's determination that he is ineligible for unemployment benefits because he engaged in employment misconduct by punching a coworker in the back and participating in two verbal conflicts with two coworkers, arguing that (1) respondent-employer did not have a reasonable expectation of nonviolence in its workplace because of its failure to protect relator from harassment and (2) relator engaged in conduct that an average, reasonable employee would have engaged in under the circumstances because relator was a torture victim suffering from posttraumatic stress disorder (PTSD); relator was supporting his refugee family living in Gabon; and coworkers, including the coworker whom he punched, had harassed him for years. We affirm.

FACTS

Relator Cyriaque Itoua was tortured in the Democratic Republic of Congo, came to the United States as a political asylee, and is a lawful permanent resident in the United States. He received treatment in Minnesota for PTSD. During his employment with respondent-employer Water Heater Innovations Inc. (WHI), he used his earnings to support his wife and daughter, who are refugees in Gabon.

Itoua worked as an assembler for WHI from September 22, 2008, until he was discharged on January 7, 2011. WHI has zero-tolerance policies that prohibit harassment and violence and provide that, if an employee violates either policy, the employee may receive disciplinary action up to and including termination. WHI discharged Itoua for

punching his coworker, Angel Caceres, in the back on January 4, 2011, and for his participation in two prior verbal conflicts with coworkers on March 18, 2010, and April 30, 2010. On March 18, 2010, Itoua used profanity while arguing with a coworker. On April 30, 2010, Itoua engaged in a "loud shouting match" with a different coworker who called Itoua "a monkey" and used "racial epithets," for which WHI disciplined the coworker. WHI issued verbal warnings to Itoua after both incidents.

During Itoua's employment with WHI, he had frequent conflicts with Caceres, which Caceres often initiated. On January 4, 2011, Caceres approached Itoua from behind while Itoua was operating a dangerous six-inch diffuser tool, knocked the tool from Itoua's hand, and then turned around to walk away. Itoua testified that, in response to Caceres's action, "I didn't hit. . . . I turned and I kind of pushed him with my open palms and hand. . . . It was not intentional. It was a reaction." But an eyewitness, Dennis Countz, testified that Itoua "went behind [Caceres] and punched him in the back" with a "closed fist" and affirmed that Itoua "intended to hit [Caceres]."

Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Itoua was ineligible for unemployment benefits because he engaged in employment misconduct. Itoua appealed and testified at his evidentiary hearing that his coworkers' harassment of him from the beginning of his employment with WHI was racial harassment. But WHI's human resources manager, Shirley Bonawitz, testified that she was only aware of one racial-harassment complaint from

Itoua, which concerned the April 30 incident.[1] Itoua testified that although the coworker involved in the April 30 incident temporarily stopped harassing him after being disciplined by WHI, the coworker "later . . . started [bothering him] again." But according to a report from a meeting on January 6, 2011, between Itoua and WHI, Itoua "stated that his relationship was better with [the coworker] and that he really hasn't had a problem with him since then."

The unemployment-law judge (ULJ) concluded that Itoua was ineligible for employment benefits because Itoua's verbal conflicts on March 18 and April 30, and physical conflict on January 4, constituted employment misconduct and Countz's testimony regarding the January 4 incident was more credible than Itoua's testimony. Itoua requested reconsideration. The ULJ affirmed, rejecting as unconvincing Itoua's argument that his actions were reasonable because they were "his response to ongoing racial harassment."

Itoua appeals.

D E C I S I O N

In reviewing a decision of a ULJ, this court may reverse or modify a decision if the substantial rights of the relator may have been prejudiced because the findings, inferences, or decision are, among other things, affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010). "Whether an employee engaged in conduct that disqualifies the employee from unemployment

[1] Itoua asserts in his brief that the March 18 incident was also the "direct result of racial harassment by [Itoua's] co-workers," citing to several pages of his testimony. But neither that testimony nor the record supports his assertion.

benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "[W]hether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). "Whether the employee committed a particular act is a question of fact." *Brisson v. City of Hewitt*, 789 N.W.2d 694, 696 (Minn. App. 2010). This court reviews "the ULJ's factual findings in the light most favorable to the decision," *Stagg*, 796 N.W.2d at 315 (quotation omitted), and "will not disturb those findings if the evidence substantially sustains them," *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 749 (Minn. App. 2010). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted). "[T]he issue is not whether the employer can choose to terminate the employment relationship, but rather whether, now that the employee has been terminated, there should be unemployment compensation, a determination which focuses on the willfulness of the employee's behavior." *Schmidgall*, 644 N.W.2d at 806 (quotation omitted).

Burden of Proof

Itoua argues that the common law places the burden of proof on employers to prove employment misconduct because the 2009 amendment to the unemployment-insurance law removed language that eliminated burdens of proof. We disagree. This court reviews the construction of statutes de novo. *Bearder v. State*, 806 N.W.2d 766, 770 (Minn. 2011). "When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for

construction and thereby supply the omissions of the legislature." *Botler v. Wagner Greenhouses*, 754 N.W.2d 665, 671 (Minn. 2008) (quotation omitted); *cf.* Minn. Stat. § 645.36 (2010) ("When a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided.").

The common law formerly required that "[t]he employer has the burden to prove . . . that an employee has committed 'misconduct' so as to be disqualified from receiving benefits," *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989), because of the common-law presumption that an employee is presumed "eligible to receive unemployment compensation after discharge," *McGowan v. Exec. Express Transp. Enters., Inc.*, 420 N.W.2d 592, 595 (Minn. 1988). But the legislature eliminated the common-law burden of proof and presumption of eligibility in a 1999 amendment, adding phrases including "[t]he evidentiary hearing shall be conducted . . . without regard to any common law burden of proof as an evidence gathering inquiry and not an adversarial proceeding" and "[t]here shall be no presumption of entitlement or nonentitlement to benefits." *See* 1999 Minn. Laws ch. 107, §§ 40, at 408; 45, at 429; 47, at 431–32 (amending Minn. Stat. §§ 268.069, subd. 2, 268.101, subd. 2(e), 268.105, subd. 1(b)); *see Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004) (discussing 1999 amendment that eliminated burden of proof), *review denied* (Minn. Mar. 30, 2004). In 2009, the legislature removed "without regard to the burden of proof" and "and not an adversarial proceeding." 2009 Minn. Laws ch. 78, arts. 3, § 5, at 590; 4, §§ 32–34, at 614–15 (amending Minn. Stat. §§ 268.069, subd. 2, 268.101, subd. 2(c), 268.105, subd. 1(b)).

The 2009 amendment does not involve "an ambiguity of expression" but, rather, it involves "a failure of expression" because the legislature introduced no language that even ambiguously revived the common-law burden of proof. Moreover, although the 2009 amendment removed some of the 1999 amendment's language, it did not remove the language that overrode the common-law presumption that justified placing the burden of proof on the employer: the presumption that an employee is eligible for unemployment compensation. *See* Minn. Stat. § 268.069, subd. 2 (2010) (stating that there is no presumption or entitlement to benefits). We therefore conclude that the legislature did not revive the common-law burden of proof with its 2009 amendment, and an employer does not bear the burden to prove that an employee engaged in employment misconduct.

Employment Misconduct

An employee is ineligible for unemployment benefits if the employee is discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee . . . ." *Id.*, subd. 6(a) (2010). In *Potter v. N. Empire Pizza, Inc.*, this court affirmed a ULJ's conclusion that the relator engaged in employment misconduct by "poking a coworker in the ribcage," holding that "employers may reasonably expect employees to refrain from engaging in even single acts of combative physical contact." 805 N.W.2d 872, 878 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). We noted that "violence in the workplace,

however minor, is a serious violation of an employer's reasonable expectations." *Id.* at 876.

Itoua attempts to distinguish *Potter* by arguing that, unlike the relator in *Potter*, he did not instigate the confrontation with Caceres. Itoua's argument is unpersuasive. Although Itoua did not instigate the confrontation, he escalated it by punching Caceres in the back after Caceres turned to walk away.

Itoua also argues that, unlike the employer in *Potter*, WHI did not have a reasonable expectation of nonviolence in its workplace because WHI's failure to "effectively enforce" its zero-tolerance anti-harassment policy after Itoua reported harassment eliminated any reasonable expectation that employees would follow its nonviolence policy. Itoua similarly argues that the ULJ erred by failing to factually determine whether WHI itself had a right to reasonably expect Itoua to not engage in physical violence at work. We disagree.

"[W]hether a particular act constitutes disqualifying misconduct is a question of law," not a question of fact. *Stagg*, 796 N.W.2d at 315. In *Potter*, we did not merely hold that the employer in that case had a reasonable expectation of workplace nonviolence but rather that "*employers* may reasonably expect employees to refrain from engaging in even single acts of combative physical contact." *Potter*, 805 N.W.2d at 878 (emphasis added). Moreover, "the focus of the [employment-misconduct] inquiry is on the employee's conduct, not that of the employer." *Stagg*, 796 N.W.2d at 316. And regardless, as a factual matter, the record indicates that WHI *did* enforce its anti-harassment policy after Itoua complained of racial harassment in connection with the

April 30 incident because, after Itoua made his complaint to WHI, his coworker at least temporarily stopped harassing him.

Itoua argues that the ULJ erred by failing to consider whether his single act of combative violence on January 4 rose to the level of employment misconduct, specifically arguing that "[b]y failing to address [whether the March 18 and April 30 verbal conflicts resulted from racial harassment], the ULJ failed to adequately assess whether Mr. Itoua's reaction to the single incident on January 4 . . . rose to the level of misconduct." Itoua's arguments are unpersuasive. "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct." Minn. Stat. § 268.095, subd. 6(d) (2010). But the ULJ concluded that Itoua engaged in employment misconduct not only because of the January 4 incident in which he punched Caceres, but also because of his verbal conflicts with coworkers on March 18 and April 30. Moreover, "employers may reasonably expect employees to refrain from engaging in even single acts of combative physical contact." *Potter*, 805 N.W.2d at 878.

Itoua argues that the ULJ's determination that WHI's decision to discharge Itoua was partly based on the March 18 and April 30 incidents is not supported by substantial evidence because "the ULJ ignored unrebutted testimony of Mr. Itoua explaining that the prior verbal arguments for which he was warned all stemmed from his coworkers' use of racial epithets against him." Itoua's argument is unconvincing. Whether the March 18 and April 30 incidents "stemmed" from racial harassment is irrelevant to whether substantial evidence supports the ULJ's conclusion. *See Dourney v. CMAK Corp.*, 796

N.W.2d 537, 539 (Minn. App. 2011) ("Substantial evidence is (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." (quotation omitted)). Bonawitz testified that Itoua was terminated not only for punching Caceres on January 4, but also for the March 18 and April 30 verbal conflicts.

Itoua argues that this court's decision in *Oman v. Daig Corp.* is "useful" because "[i]n *Oman*, this Court held that a claimant's use of violence was not *per se* misconduct." *See Oman*, 375 N.W.2d 533, 535, 536–38 (Minn. App. 1985), *superseded by statute*, Minn. Stat. § 268.095, subd. 6(d) (Supp. 2009), *as recognized in Potter*, 805 N.W.2d at 875–76; Minn. Laws. ch. 15, § 9, at 48. Itoua's argument is unpersuasive. In *Oman*, this court applied the isolated-hotheaded-incident exception to employment misconduct, 375 N.W.2d at 536–38, but "the former single-incident or hotheaded-incident exception . . . no longer exists," *Potter*, 805 N.W.2d at 878.

Itoua also argues that the ULJ's determination that Countz's testimony was more credible than Itoua's testimony was erroneous because it was unsupported by substantial evidence. Itoua misunderstands the law. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson*, 766 N.W.2d at 332. We therefore will not disturb the ULJ's determination that Countz's testimony regarding the January 4 incident was more credible than Itoua's testimony.

Itoua asserts that the ULJ failed to articulate reasons for crediting Countz's testimony over Itoua's testimony. We disagree. "When the credibility of an involved

party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2010). The ULJ found Countz's testimony "the most credible regarding the incident between Itoua and Caceres" because, among other reasons, "Countz['s] . . . testimony was consistent with his statements to Bonawitz and [WHI's plant superintendent] immediately following the incident," and "Itoua's testimony was simply not believable" because "it is unrealistic that Itoua spun around and inadvertently hit Caceres with the back of his hand considering the only eye witness to the incident saw him hit Caceres with a closed fist."

We therefore conclude that, in the absence of an applicable employment-misconduct exception, Itoua engaged in employment misconduct by punching his coworker on January 4 and participating in two verbal conflicts with two coworkers.

Average-Reasonable-Employee Exception

Itoua argues that his conduct was not employment misconduct because it was "within the range of [an average, reasonable employee's] responses" under the following circumstances: (1) he was a victim of torture and suffered from PTSD; (2) he endured almost two years of verbal harassment at work to provide for his refugee family in Gabon; and, (3) immediately before punching Caceres, he "was the victim of a potentially dangerous assault by one of the men who had repeatedly harassed him." Itoua's argument is unpersuasive. It is not employment misconduct for an employee to engage in "conduct an average, reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subd. 6(b)(4) (2010). This court in *Potter* rejected

the relator's average-reasonable-employee argument that "anyone [the relator's] age would have given the [coworker] 'a slap,'" because "this fact was not proven, and on the undeveloped record we assume and hope that many reasonable people would have withstood the provocation without slapping or poking." 805 N.W.2d at 877. Likewise, Itoua did not provide any evidence that using physical violence toward another person is conduct that an average, reasonable employee would have engaged in under his circumstances. Moreover, Itoua punched Caceres in the back, *after* Caceres turned to walk away. Itoua was not defending himself; he was retaliating. We therefore conclude that Itoua does not satisfy the average-reasonable-employee exception.

Itoua argues that this court's decision in *Hanson v. Crestliner Inc.*, 772 N.W.2d 539 (Minn. App. 2009), supports his argument. We disagree. *Hanson* involved absenteeism due to an immediate family member's medical emergency, not violence in the workplace. 772 N.W.2d at 544.

Because Itoua committed employment misconduct, we agree with the ULJ that Itoua is ineligible for unemployment benefits.

Affirmed.